

ESTTA Tracking number: **ESTTA694317**

Filing date: **09/08/2015**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91204122
Party	Plaintiff Empire State Building Company L.L.C.
Correspondence Address	ERIC J SHIMANOFF COWAN LIEBOWITZ & LATMAN PC 1133 AVENUE OF THE AMERICAS NEW YORK, NY 10036 UNITED STATES ejs@cll.com, lmr@cll.com, wmb@cll.com, trademark@cll.com, fxm@cll.com, mlk@cll.com
Submission	Other Motions/Papers
Filer's Name	Lindsay M. Rodman
Filer's e-mail	trademark@cll.com, lmr@cll.com, ejs@cll.com, wmb@cll.com
Signature	/Lindsay Rodman/
Date	09/08/2015
Attachments	Opposer's Evidentiary Objections.pdf(19141 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In re Application Serial No. 85/213,453
Filed: January 8, 2011
For Mark: NYC BEER LAGER and Design
Published in the Official Gazette: December 6, 2011

-----	X	
	:	
ESRT EMPIRE STATE BUILDING, L.L.C.,	:	
	:	Opposition No. 91189692
Opposer,	:	
	:	
v.	:	
	:	
MICHAEL LIANG,	:	
	:	
Applicant.	:	
-----	X	

OPPOSER'S EVIDENTIARY OBJECTIONS

COWAN, LIEBOWITZ & LATMAN, P.C.
1133 Avenue of the Americas
New York, New York 10036-6799
(212) 790-9200

OPPOSER'S EVIDENTIARY OBJECTIONS

Opposer submits the following evidentiary objections:

1. **Improper Lay Opinion.**

A significant portion of testimony elicited by Applicant during his testimony period, including his own testimony and that of his friend, Xuefeng Yang, was based on questions concerning the witnesses' own unsubstantiated, speculative and personal opinions whether they believed the parties' marks were confusing similar (Liang Tr. (5/22/15) 12:7-13:25, 14:14-16:22, 16:22-25, 17:1-19, 19:8-21:10, 25:9-24, 26:17-27:9; Yang Tr. 10:17-11:7, 14:11-15:12, 15:19-16:15, 16:25-18:24, 19:14-20:24, 21:11-22:11, 25:3-27:12 35:13-22), whether they believed consumers would be confused (Liang Tr. (5/22/15) 18:14-19:7, 37:11-38:7; 38:22-39:11, 45:12-46:12) and other issues concerning consumer perception and behavior (Liang Tr. (5/22/15) 21:11-16, 22:16-23:7, 23:8-24:8, 27:23-29:18, 35:25-37:10, 39:12-23, 41:17-42:2; Yang Tr. 36:7-23, 37:1-18, 61:9-63:24).

Applicant and Mr. Yang admitted that such testimony merely was their own subjective personal opinion and was not based on any survey or experience with relevant consumers or the industry. (Liang Tr. (5/22/15) 53:3-54:6, Yang Tr. 38:11-25, 40:12-16, 41:2-46:16, 60:3-11).

To the Applicant seeks to rely on this testimony, it should be rejected as inadmissible speculative lay opinion under Fed. R. Evid. 602, 701. *See Tyco Healthcare Group LP v. Kimberly-Clark Corp.*, 463 F. Supp. 2d 127, 131 (D. Mass. 2006) (striking portion of declaration regarding declarant's personal opinion regarding likely confusion); *iMedica Corp. v. Medica Health Plansmedica Health Plans*, 2007 TTAB LEXIS 140, at *17-18 (T.T.A.B. June 7, 2007) ("As far as Mr. Booher's testimony regarding the meaning of 'i' based on his experience, that testimony . . . is not admissible to the extent that it is submitted to show how the consuming public in general regards the term 'i' because Mr. Booher has not been qualified to provide testimony on how the consuming public in general regards the term 'i' or on the definition of 'i'"). *See also Coca-Cola Co. v.*

Overland, Inc., 692 F.2d 1250, 1255 (9th Cir. 1982) (“Overland’s employees are not qualified to testify as to what their customers are thinking when using the term ‘Coke’”).

To the extent admissible as part of Applicant’s testimony, such testimony, mainly regarding ultimate issues in the opposition, nonetheless should be disregarded by the Board. *Alcatraz Media Inc. v. Chesapeake Marine Tours Inc.*, 107 U.S.P.Q.2d 1750, 1755 (T.T.A.B. 2013) (“we have disregarded any opinion testimony regarding the ultimate disposition of the claims asserted herein”); *Steiger Tractor, Inc. v. Steiner Corporation*, 221 U.S.P.Q. 165, 173 (T.T.A.B. 1984) (“We also accord limited weight to the testimony of applicant’s four witnesses that ‘STEIGER’ and ‘STEINER’ are not confusingly similar marks and would not be so viewed. These were individuals, with the exception of P. Hogie, from opposer’s home state (most located in proximity to applicant’s headquarters) with longstanding connections and associations with applicant or its principals. Their perceptions can hardly be regarded as representative of the views of purchasers and users in the national and international markets occupied by opposer nor did their testimony relate specific facts from which solid inferences as to the absence of likelihood of confusion might be drawn”).

2. Applicant’s Questions Concerning “Original” Documents.

During Applicant’s cross-examination of ESB’s in-house legal counsel, Crystal Persaud, Applicant’s attorney asked numerous questions concerning whether licensing and other agreements introduced during Mr. Persaud’s testimony deposition were “originals.” Persaud Tr. 97:23-104:3, 108:25-109:19, 128:18-134:12, 144:10-149:9.

Opposer objects to each of these questions, which sought to impose a definition of “original” that is contrary to the Federal Rules of Evidence. Fed. R. Evid. 1001 defines an “original” writing as “the writing . . . itself ***or any counterpart intended to have the same effect by the person who executed or issued it***” (emphasis added). Applicant’s attorney, who at one point even began reading into the record his own definition of “original” printed from an on-line dictionary, Persaud Tr. 144:10-146:16

(objectionable itself as argumentative and lacking foundation), clearly and impermissibly sought to impose a more limiting definition that encompassed only the inked-signed contract.

3. Mr. Yang's Testimony on Trademark Law

Mr. Yang also purported to provide testimony concerning trademark law, claiming he is knowledgeable of such matters from a friend in China despite the fact that he has never attended law school. Yang Tr. (5/22/15) 57:4-59:13. Such testimony is irrelevant and improper lay opinion.

4. Other Objections.

Record Citation	Objection(s)
Liang Tr. (5/22/15) 12:7-13:14	Argumentative
Liang Tr. (5/22/15) 21:17-22:15	Vague and ambiguous
Liang Tr. (5/22/15) 22:16-23:7	Vague and ambiguous; Speculative
Liang Tr. (5/22/15) 25:9-24	Mischaracterizes deponent's prior testimony
Liang Tr. (5/22/15) 26:17-27:9	Vague and ambiguous; Speculative
Liang Tr. (5/22/15) 27:10-27:22	Vague and ambiguous; Speculative; Mischaracterizes deponent's prior testimony; Argumentative
Liang Tr. (5/22/15) 27:23-28:16, 29:5-18	Vague and ambiguous; Speculative
Liang Tr. (5/22/15) 29:19-31:10	Lack of foundation
Liang Tr. (5/22/15) 35:14-24	Lack of foundation
Liang Tr. (5/22/15) 39:12-23	Vague and ambiguous
Liang Tr. (5/22/15) 42:23-45:3	Leading
Yang Tr. 10:10-16	Hearsay
Yang Tr. 30:18-23	Vague and ambiguous
Yang Tr. 30:24-35:12	Relevance
Yang Tr. 62:13-63:3	Vague and ambiguous

Persaud Tr. 110:11-111:4	Mischaracterizes deponent's prior testimony
Persaud Tr. 131:6-11	Argumentative
Persaud Tr. 161:11-163:4	Relevance
Persaud Tr. 200:19-205:9	Relevance

Dated: New York, New York
September 8, 2015

COWAN, LIEBOWITZ & LATMAN, P.C.
Attorneys for Opposer

By: /Eric J. Shimanoff/
Eric J. Shimanoff
William M. Borchard
Mary L. Kevlin
Lindsay M. Rodman
1133 Avenue of the Americas
New York, New York 10036-6799
(212) 790-9200

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and complete copy of the foregoing OPPOSER'S EVIDENTIARY OBJECTIONS was served on Applicant's Attorney of Record on September 8, 2015 by First Class Mail, postage prepaid, addressed to:

David Yan, Esq.
Law Offices of David Yan
136-20 38th Avenue, Suite 11E
Flushing, New York 11354-4232

Dated: New York, New York
September 8, 2015

/Lindsay M. Rodman/
Lindsay M. Rodman